

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANE L. KELLEY and KENNETH HANSEN,)	
)	No. C07-0475 MJP
Plaintiffs,)	
)	<u>PUTATIVE CLASS ACTION</u>
v.)	
)	[PROPOSED]
MICROSOFT CORPORATION, a Washington)	
Corporation,)	PROTECTIVE ORDER
)	
Defendant.)	

THIS MATTER came before the Court on the agreed motion of Plaintiffs Kelley and Hansen and Defendant Microsoft Corporation for entry of a Protective Order Regarding Handling of CONFIDENTIAL Materials. Having considered the parties' agreed motion and the other pleadings and papers filed in this matter, and to protect the confidentiality of sensitive material contained in documents produced and material disclosed in this litigation,

IT IS HEREBY ORDERED that the following Protective Order be entered in this matter and that the parties and non-parties shall follow the procedures set forth below with respect to information, documents, or things produced in this litigation:

1. The disclosing party who designates any material "CONFIDENTIAL" bears the burden of establishing the "CONFIDENTIAL" status of such material in any situation in

1 which the designation is at issue, and nothing in this Order shall be construed to alter such
2 burden. This Order is stipulated to and entered without prejudice to the rights of any party to
3 assert or contest the "CONFIDENTIAL" status of any material as set forth herein.

4 2. This Order shall apply to and govern all depositions, documents, information or
5 things produced in response to requests for production of documents, answers to
6 interrogatories, responses to requests for admissions and all other discovery taken under the
7 Federal Rules of Civil Procedure, and other information which the disclosing party designates
8 as "CONFIDENTIAL" hereafter furnished, directly or indirectly, by or on behalf of any party
9 or any non-party in connection with this action. As used herein, "disclosing party" shall refer
10 to the parties to this action or to non-parties who give testimony or produce documents or
11 other material.

12 3. The following material may be designated as "CONFIDENTIAL": any trade
13 secret or other confidential research, design, development, financial, or commercial
14 information, as such terms are used in Rule 26(c)(7) and any applicable case law interpreting
15 Rule 26(c)(7), contained in any document, discovery response or testimony.

16 4. In designating material as "CONFIDENTIAL," a disclosing party or non-party
17 shall make such a designation only as to material which it in good faith believes is
18 confidential. A party receiving material designated as "CONFIDENTIAL" by the producing
19 party or non-party shall use that material solely for the purpose of conducting this litigation
20 but not for any other purpose whatsoever.

21 5. In the absence of written permission from the disclosing party or non-party, or an
22 order of the Court, material designated as "CONFIDENTIAL" shall be used solely for the
23 purposes of litigation between the parties hereto, and may be disclosed by the parties only to
24 the following persons:
25
26
27

1 (a) The attorneys working on this action on behalf of any party, including in-house
2 attorneys, paralegals, and staff, stenographic and clerical employees and contractors working
3 under the direct supervision of such counsel;

4 (b) Any expert or consultant who is expressly retained or sought to be retained by
5 any attorney described in paragraph 5(a) to assist in preparation of this action for trial or for
6 motions, with disclosure only to the extent reasonably necessary to perform such work;

7 (c) Any person from whom testimony is taken, except that such person (i) may be
8 shown copies of "CONFIDENTIAL" material only in preparation for and during her/his
9 testimony if it relates to his/her testimony (relevance will be determined in good faith by
10 counsel preparing the deponent), and (ii) may not retain any "CONFIDENTIAL" material;

11 (d) The Court, jury, court personnel, court reporters, and other persons connected
12 with the Court; and

13 (e) An individual named plaintiff, with disclosure only to the extent reasonably
14 necessary for the individual named plaintiff's participation in the case as determined in good
15 faith by plaintiffs' counsel.

16 6. The persons described in paragraph 5(b), 5(c), and 5(e) shall have access to the
17 "CONFIDENTIAL" material only after they have been made aware of the provisions of this
18 Order and have manifested their assent to be bound thereby by signing a copy of the annexed
19 "ACKNOWLEDGMENT." The persons receiving "CONFIDENTIAL" material are enjoined
20 from disclosing that material to any other person, except in conformance with this Order.
21 This paragraph does not apply when a party in good faith seeks to use a "CONFIDENTIAL"
22 document at a deposition of a deponent who has not already signed the
23 ACKNOWLEDGMENT, in which case, the party's obligation shall be to sincerely ask the
24 deponent to sign the ACKNOWLEDGMENT, but the party's right to proceed with the
25 deposition and to use "CONFIDENTIAL" material at the deposition shall not depend on the
26 deponent's willingness to do so. In the event a deponent being shown "CONFIDENTIAL"

1 material refuses to sign the ACKNOWLEDGEMENT, the deponent shall not be permitted to
2 retain, reproduce, or copy all or any part of the "CONFIDENTIAL" material.

3 7. A list shall be maintained by counsel for the parties hereto of the names of all
4 persons (except for counsel and their support personnel) to whom any "CONFIDENTIAL"
5 material is disclosed, or to whom the information contained therein is disclosed, and such list
6 shall be available for inspection by the Court or opposing counsel upon request, and with a
7 good faith belief that this Order has been violated, except that a party or a party's counsel
8 shall not be required to identify by name a consulting expert except as otherwise provided by
9 the Federal Rules of Civil Procedure. Upon request made within sixty (60) days of the
10 termination of this lawsuit by settlement, final judgment or otherwise, including final
11 appellate action or the expiration of time to appeal or seek further review, the parties shall
12 provide opposing counsel with a copy of the aforementioned lists, except that a party or a
13 party's counsel shall not be required to identify by name a consulting expert except as
14 otherwise provided by the Federal Rules of Civil Procedure, provided, however, that upon a
15 showing by a disclosing party of a good faith basis for believing that this Order has been
16 violated, a party shall be required to disclose whether any consulting expert has been given
17 access to "CONFIDENTIAL" material of the type or category of "CONFIDENTIAL"
18 material involved in the alleged or suspected breach.

19 8. Each individual who receives any "CONFIDENTIAL" material hereby agrees to
20 subject himself/herself to the jurisdiction of this Court for the purpose of any proceedings
21 relating to the performance under, compliance with or violation of this Order.

22 9. The recipient of any "CONFIDENTIAL" material that is provided under this
23 Order shall maintain such material in a secure and safe area and shall exercise the same
24 standard of due and proper care with respect to the storage, custody, use and/or dissemination
25 of such material as is exercised by the recipient with respect to its own proprietary material.
26 To the extent Microsoft is required or ordered to produce source code, the parties will prepare
27

1 an addendum to this Order to address the production and storage of source code.

2 "CONFIDENTIAL" material shall not be copied, reproduced, summarized, extracted or
3 abstracted, except to the extent that such copying, reproduction, summarization, extraction or
4 abstraction is reasonably necessary for the conduct of this lawsuit. All such copies,
5 reproductions, summarizations, extractions, and abstractions shall be subject to the terms of
6 the Order and labeled in the same manner as the designated material on which they are based.

7 10. Disclosing parties or non-parties shall designate "CONFIDENTIAL" material as
8 follows:

9 (a) In the case of documents, interrogatory answers, responses to requests to
10 admit, and the information contained therein, designation shall be made by placing the
11 following legend on every page of any such document before production:
12 "CONFIDENTIAL." In the event that a party or non-party inadvertently fails to stamp or
13 otherwise designate a document or other material as "CONFIDENTIAL" at the time of its
14 production, that party or non-party may at any time thereafter stamp or otherwise designate
15 the document or other material as "CONFIDENTIAL." The delay in designating a document
16 as "CONFIDENTIAL" shall not, in and of itself, be deemed to have effected a waiver of any
17 of the protections of this Order, but such document or other material shall be treated as
18 "CONFIDENTIAL" only beginning at the time such designation occurs.

19 (b) "CONFIDENTIAL" material may be used in depositions. Designation of the
20 portion of the deposition transcript (including exhibits) which contains "CONFIDENTIAL"
21 material shall be made by a statement to such effect on the record in the course of the
22 deposition or, upon review of such transcript, by counsel for the party or non-party to whose
23 "CONFIDENTIAL" material the deponent has had access, which counsel shall so designate
24 within fourteen (14) days after counsel's receipt of the transcript. During those fourteen days,
25 the entire deposition transcript, including exhibits, shall be deemed "CONFIDENTIAL."
26
27

1 (c) Any "CONFIDENTIAL" material produced in a non-paper media (e.g.,
2 videotape, audiotape, computer disk, etc.) may be designated as such by labeling the outside
3 of such non-paper media as "CONFIDENTIAL" and producing this material in a sealed
4 envelope. In the event a receiving party generates any electronic copy, "hard copy,"
5 transcription, or printout from any such designated non-paper media, such party must treat
6 each copy, transcription, or printout as designated and label it in a manner effective to ensure
7 proper treatment.

8 11. A party shall not be obligated to challenge the propriety of a
9 "CONFIDENTIAL" designation at the time made, and failure to do so shall not preclude a
10 subsequent challenge thereto at any time during the course of this litigation. In the event that
11 any party to this litigation disagrees at any stage of these proceedings with such designation,
12 such party shall provide to the producing party or non-party written notice of its disagreement
13 with the designation. The parties (and any non-party involved) shall first try to resolve such
14 dispute in good faith on an informal basis consistent with the requirement to confer in good
15 faith under Rules 26(c) and 37(a)(2)(A)-(B). If the dispute cannot be resolved, the party or
16 non-party making the designation may request appropriate relief from the Court. Provided the
17 party making the designation seeks relief from the Court within thirty (30) days of receiving a
18 notice of disagreement, the materials in question shall retain their "CONFIDENTIAL" status
19 until the Court rules on any such motion. The party making the designation may request a
20 telephonic hearing with respect to the "CONFIDENTIAL" status of materials in compliance
21 with Local Rule 7(i). Nothing in this Order shall alter the burden of the disclosing party of
22 establishing the "CONFIDENTIAL" status of materials.

23 12. Documents containing "CONFIDENTIAL" material shall not be filed with the
24 Court unless it is reasonably necessary to do so for purposes of trial, motions (including
25 without limitation, motions for class certification, preliminary injunction or summary
26 judgment) or other Court matters. The filing party shall take all reasonable steps to file
27

1 “CONFIDENTIAL” material under seal in compliance with Rule 26(c)(7) and Local Rule
2 5(g).

3 13. If a party wishes to use “CONFIDENTIAL” material to support or oppose a
4 motion or at trial, the party submitting the material:

5 (a) If seeking to have the record containing such material sealed, shall submit to
6 the Court a motion to seal pursuant to CR 5(g)(2) contemporaneous with the filing of the
7 “CONFIDENTIAL” material.

8 (b) If not seeking to have the record containing such material sealed and not the
9 person making the designation, shall, at the time of filing or desiring to use the
10 “CONFIDENTIAL” material, submit the materials pursuant to the following procedure: (i)
11 the document(s) containing or referring to “CONFIDENTIAL” material shall be put in an
12 envelope, sealed in the envelope, and provided to the Court; (ii) the envelope must be labeled
13 “CONDITIONALLY UNDER SEAL”; and (iii) the party submitting the document(s) must
14 affix to the envelope a cover sheet that contains the case caption and states that the enclosed
15 record is subject to a motion to file the record under seal. The disclosing party or non-party
16 who originally designated the material “CONFIDENTIAL” may then file a motion to seal,
17 pursuant to CR 5(g)(2), within fifteen (15) business days after the document(s) are provided to
18 the Court, and the Clerk of the Court shall maintain such document(s) under seal pending the
19 filing of such a motion. If no person files a motion to seal, the document(s) will be filed,
20 unsealed, after the expiration of fifteen (15) business days.

21 (c) Any motion to seal filed under any subsection of this Paragraph 13 shall be
22 noted for consideration seven (7) judicial days after filing in accordance with Local Rule 7(d).
23 The Clerk of the Court shall maintain the “CONFIDENTIAL” materials under seal until the
24 Court rules on the motion to seal, subject to the provisions of the following Paragraph.

25 14. In the event the Court denies a filing party’s or non-party’s motion to seal
26 documents labeled “CONFIDENTIAL,” the Clerk of the Court shall leave the documents
27

1 under seal for a period of three (3) three judicial days after the date of the Court's denial of
2 the motion to seal. Within that time period, the filing party may, at its option, file
3 replacement documents that do not contain "CONFIDENTIAL" material, in which case the
4 documents initially filed under seal shall be returned to the filing party and not be considered
5 by the Court. If the filing party does not file replacement documents within the time period
6 prescribed by this Paragraph, the material shall be filed unsealed in the Court file.

7 15. In the event that any "CONFIDENTIAL" material is used in any Court
8 proceeding in connection with this litigation, it shall not lose its "CONFIDENTIAL" status
9 through such use, and the parties shall take all steps reasonably required to protect its
10 confidentiality during such use.

11 16. If "CONFIDENTIAL" material is disclosed to any person other than in the
12 manner authorized by this Order, the person or party responsible for the disclosure must
13 seasonably bring all pertinent facts relating to such disclosure to the attention of counsel for
14 the designating party or non-party and, without prejudice to any other rights and remedies of
15 the parties or non-parties, make every effort to prevent further disclosure by it or by the
16 person who was the recipient of such material.

17 17. Nothing in this Order shall preclude any parties or non-parties to the lawsuit or
18 their attorneys (a) from showing a document designated as "CONFIDENTIAL" to an
19 individual who either prepared the document or is identified on the face of the document as an
20 addressee or copy addressee, or (b) from disclosing or using, in any manner or for any
21 purpose, any material or documents from the party's or non-party's own files which the party
22 or non-party itself has designated as "CONFIDENTIAL."

23 18. In the event any receiving party having possession, custody or control of any
24 "CONFIDENTIAL" material receives a subpoena, request for production of documents, or
25 other process or order to produce such material in another, unrelated legal proceeding, from a
26 non-party to this action, such receiving party shall (1) give notice of the subpoena, request for
27

1 production of documents, or other process or order to counsel for the disclosing party or non-
2 party that designated the material as "CONFIDENTIAL", (2) furnish counsel for that
3 disclosing party or non-party with a copy of said subpoena, request for production of
4 documents, or other process or order, and (3) cooperate with respect to all reasonable and
5 legitimate procedures sought to be pursued by the disclosing party or non-party whose
6 interests may be affected. The disclosing party or non-party asserting the
7 "CONFIDENTIAL" treatment shall have the burden of defending against such subpoena,
8 process or order. The party receiving the subpoena, request for production of documents, or
9 other process or order shall be entitled to comply with it except to the extent the disclosing
10 party or non-party asserting the "CONFIDENTIAL" treatment is successful in obtaining an
11 order modifying or quashing the subpoena, request for production of documents, or other
12 process or order.

13 19. The inadvertent production in the course of discovery in this action of any
14 document or material (whether designated as "CONFIDENTIAL" or not) shall not be deemed
15 to waive whatever attorney-client privilege, work product protection or other privilege or
16 immunity that would otherwise attach to the document or material produced or to other
17 documents or material, as long as the disclosing party or non-party, promptly after discovery,
18 notifies the other party or parties of the claim of privilege or other protection or immunity.
19 Upon such notice, the other party or parties shall promptly destroy all copies of the documents
20 or material referred to in such party's or parties' possession, custody, or control, and notify
21 the disclosing party or non-party that it has done so, and shall notify the disclosing party or
22 non-party of any other persons to whom the document has been provided and take reasonable
23 steps to retrieve it from such persons consistent with Rule 26(b)(5)(B). Such destruction and
24 notice shall not constitute an acknowledgment that the claimed document or material is in fact
25 privileged or entitled to protection or immunity.
26
27

20. Within sixty (60) days of the termination of litigation between the parties, including final appellate action or the expiration of time to appeal or seek further review, all "CONFIDENTIAL" material and all copies thereof shall be returned to the disclosing party or non-party or shall be destroyed. If destroyed, counsel shall certify the destruction and provide a copy of the certification to the producing party or non-party. Counsel for each party shall be entitled to retain all pleadings, motion papers, legal memoranda, correspondence and work product.

21. Except as specifically provided herein, the terms, conditions, and limitations of this Order shall survive the termination of this action.

22. This Order is without prejudice to the right of any party or non-party to seek relief from the Court from any of the provisions contained herein.

23. This Order shall not be construed as waiving any right to assert a claim of privilege, relevance, overbreadth, burdensomeness or other grounds for not producing material called for, and access to all material (whether designated as "CONFIDENTIAL" or not) shall be only as provided by the discovery rules and other applicable law.

DATED this 30th day of August, 2007.

Davis Wright Tremaine LLP
Attorneys for Defendant Microsoft
Corporation

By /s/ Stephen M. Rummage
Stephen M. Rummage, WSBA #11168
Cassandra Kinkead, WSBA # 22845
Suite 22001201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: steverummage@dwt.com

Of Counsel:

Charles B. Casper
Montgomery, McCracken, Walker &
Rhoads, LLP
123 South Broad St.
Philadelphia, PA 19109-1029
Telephone: (215) 772-7223
Fax: (215) 731-3750
E-mail: ccasper@mmwr.com

DATED this 30th day of August, 2007.

Gordon Tilden Thomas & Cordell LLP
Attorneys for Plaintiffs

By /s/ Jeffrey I. Tilden
Jeffrey I. Tilden, WSBA #12219
Jeffrey M. Thomas, WSBA #21175
1001 4th Ave., Suite 4000
Seattle, WA 98154
Telephone: (206) 467-6477
Fax: (206) 467-6292

Keller Rohrback LLP
Attorneys for Plaintiffs

By /s/ Ian S. Birk
William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384

ORDER

IT IS SO ORDERED.

Dated this _____ day of _____, 2007.

The Honorable Marsha J. Pechman
United States District Judge

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the PROTECTIVE ORDER, which was entered by the Court on _____ in *Kelley et al. v. Microsoft Corp.*, U.S. District Court, Western District of Washington at Seattle, Case No. C07-0475 MJP; that he/she is one of the persons contemplated in paragraph 5 thereof as authorized to receive disclosure of material designated "CONFIDENTIAL" by one of the parties or by non-parties; and that he/she has read and fully understands and agrees to abide by the obligations and conditions of the Protective Order.

(Signature)

(Printed Name)

(Title or Position)

(Company)

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2007, I electronically filed the foregoing PROTECTIVE ORDER with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Gordon Tilden Thomas & Cordell LLP

Keller Rohrback LLP

DATED this 30th day of August, 2007.

Davis Wright Tremaine LLP
Attorneys for Defendants

By /s/ Cassandra L. Kinkead
Cassandra L. Kinkead, WSBA #22845
Davis Wright Tremaine LLP
1201 3rd Ave, Suite 2200
Seattle, WA 98101
Telephone: (206) 757-8078
Fax: (206) 757-7078
E-mail: cassikinkead@dwt.com